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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-380

F. J. PERILLO and RUTH E. PERILLO, husband and wife,
Petitioners,

VS.

UNITED AMERICAN LIFE INSURANCE COMPANY,
a Colorado Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Comes Now United American Life Insurance Company, a Colorado corporation, Respondent, in accordance with Rule 24 of the Rules of the Supreme Court, and respectfully submits its Brief in Opposition to the Petition for a Writ of Certiorari filed herein by Petitioners.

JURISDICTION

Respondent agrees with Petitioners' statement as to their desire to invoke the jurisdiction of this Court

but Respondent respectfully submits Petitioners have shown no right or proper ground on which to invoke the jurisdiction of this Court.

QUESTIONS PRESENTED

Respondent respectfully submits that the Petitioners' Statement of Questions Presented, by their wording, definitely "begs the question" by assuming facts and principles not supported by law or evidence, as hereinafter more fully set forth. However, we will discuss each of the questions presented, pointing out the matters herein stated.

STATEMENT OF THE CASE

Respondent agrees that the opinion of the United States Court of Appeals for the Ninth Circuit substantially states the facts, having recourse to the Findings of Fact, Conclusions of Law and Judgment of the United States District Court.

ARGUMENT

On pages 4 and 5 of their Petition, Petitioners argue that the United States District Court, in this diversity case, could not lawfully grant the judgment herein under *Angel v. Bullington,* 330 U.S. 183, 91 L.Ed. 832, because Arizona has withheld deficiency judgments against mortgagors and that the judgment

was an illegal circumvention of that deficiency statute of Arizona. In this connection we submit that *Angel* is not in point, is clearly distinguishable, and involved a vastly different and inapplicable set of circumstances.

In *Angel* the plaintiff, Bullington, a Virginia resident, sold land in Virginia to Angel, a resident of North Carolina, taking in part payment Angel's note secured by a mortgage on the land. On default Bullington foreclosed the mortgage in Virginia leaving a deficiency. Bullington sought to obtain a judgment on the deficiency, first attempting to do so through the state court of North Carolina, recognizing the existence of a North Carolina statute prohibiting a deficiency judgment on account of a foreclosed mortgage but arguing that the statute was unconstitutional under the United States Constitution. The case was appealed to the Supreme Court of North Carolina, which denied him relief. Bullington elected not to appeal from that adverse decision to the Supreme Court of the United States, but further elected to file a new action on exactly the same grounds in the United States District Court in North Carolina.

This Court's holding in that case was that Bullington could have appealed to this Court from the adverse decision of the North Carolina Supreme Court on the federal questions involved; that having elected not to do so, the North Carolina Supreme Court decision became *res judicata* as to all matters; and that having become *res judicata* in the Carolina courts, the issues could not again be litigated in the federal

courts. This Court went on to state that the U. S. District Court, in a diversity case, would be bound to follow North Carolina law.

We submit that *Angel* is clearly distinguishable from and not in point in this action. Herein there was no proceeding filed in the Arizona courts and therefore the prime reason for the holding in *Angel* that the North Carolina state courts had rendered the issues *res judicata* is completely lacking in this case.

True, the federal court in the District of Arizona, in a case involving diversity, is bound to apply Arizona law and it is respectfully submitted that in our case that court did properly apply the Arizona law to the facts of our case. The clarity of the court's decision is of a high order.

Herein the trial court concluded, after considering the extensive briefs submitted by both parties, that Respondent's claim was not barred by Arizona's deficiency judgment provisions because it was based on an indebtedness evidenced by a written obligation of Petitioners (CL 11), and that there was an unpaid balance thereon of $94,577.83 plus interest remaining unpaid on the promissory note at the time of the trial on Petitioners' liability (CL 14).

Petitioners, as appellants in the Court of Appeals, in their Opening Brief did not attack the correctness of Conclusion of Law 14, nor did they therein attack the trial court's Finding of Fact 20 which stated:

> "The Perillos were given notice of all proceedings had and taken in the receivership, but never

> objected to any advances sought and obtained by the receiver from the plaintiff [Respondent] and approved by this Court."

It would appear that it would certainly be too late for them, at this late date, having consented to and having accepted the benefits of the receivership looking to the preservation of the security, to attempt to raise such issues here.

Thus *Angel* is inapplicable and there was certainly no illegal circumvention of Arizona law under that case.

Honeyman v. Hanan, 302 U.S. 377, 82 L.Ed. 312, relied upon by Petitioners, is authority only for the proposition that no federal question was presented when a New York court had dismissed an action on a collateral bond for the payment of an indebtedness acknowledged by a mortgage which had been foreclosed. Thus, if any Arizona state court had decided this case against respondents and respondents had sought relief in this Court on the ground that a federal question was involved, *Honeyman* might then be authority for jurisdiction by this Court. However, in the instant case, the federal court with original jurisdiction in a diversity action based upon the stated question, held adversely to Petitioners' contentions and stated at page 378:

> "The requirement that the right to a deficiency judgment should be determined in the foreclosure action as against one who was a party to that action raises no substantial federal question." (Citing numerous authorities.)

Petitioners argue on page 7 et seq. of their Petition that due process has been violated. We must confess that we are at a loss to understand or to follow Petitioners' reasoning. In the first place, they misconstrue the Court of Appeals' opinion, alleging that it stated that Respondent should have sought reformation. We have read the Court of Appeals' opinion very carefully and do not find any statement to the effect that Respondent should have sought reformation. The Court stated as a fact that there was no claim to reform the note or the mortgage to put the Perillos in the position of obligors of the covenants in the mortgage, but there is no statement that Respondent should have made such a claim. The Court did not hold that the Perillos are liable as obligors on the mortgage but did hold them liable for the unpaid balance of the note of which they are co-makers, the proceeds of the sale having been lawfully applied first to the payment of adjudicated taxes and expenses and the balance upon the note.

We are indeed amazed that Petitioners at this late time should attempt to raise questions in this Court involving the validity of the appointment of a receiver, since no such claim was made by them either in the District Court (which would have been the proper forum to litigate this question) or in the Court of Appeals. Petitioners claim that they are being held liable for advances to operate a bar and a bowling alley. This is not true. Those advances were found necessary to protect the security prior to fore-

closure and were paid from the proceeds of the sale as provided for in the first judgment in the case on order of the District Court and properly affirmed by the Court of Appeals. Petitioners are now being held liable for the balance due on the note, for which they *are* liable.

It is further submitted that Petitioners' argument that they are being held under some theory of stockholders' liability or "alter ego" is completely without merit, since there has never been any such holding or any such contention. It is submitted that the only purpose of the Court of Appeals in pointing out that the Perillos had set the business operation in motion was to answer their claim therein that it would be inequitable to allow Respondent to apply the proceeds of the sale to taxes and other expenses of the receivership on the ground that Petitioners were "completely innocent bystanders" in regard to those operations.

Even, however, if we assume for the purpose of Petitioners' argument (which we expressly refute) that any one or more of Petitioners' contentions in this regard is valid, we submit that this would still fail to constitute a denial of due process under the United States Constitution. It would only mean that a trial court might have erred in applying the law to the facts of the case and that the appellate court had affirmed based upon other sufficient grounds.

If such affirmance, in itself, constitutes a denial of due process, then, we submit, every litigant in every

state and federal court in the nation who feels that he has lost money or property because the court erred in applying state or federal law could come into this Court and petition for relief on the theory of a denial of due process. No authority is cited by Petitioners, nor do we believe such exists holding that such a set of facts constitutes a denial of due process.

Petitioners further claim, on page 10, that the District Court's denial of the Motion to Amend the Decree established the law of the case. Certainly it established the law of the case to the extent that it went—that is, that the foreclosure decree (which was not a decree against Petitioners but against the mortgagor) would not be amended. It did not establish anything as far as Petitioners' liability was concerned, that question having been expressly reserved for later proceedings by means of a voluntary stipulation of the Petitioners and order of the court thereon (CL 23).

Petitioners argue that the note was merged in the first foreclosure judgment and was therefore discharged, and they cite various cases as authority for that general proposition. This question was extensively briefed and argued in the Court of Appeals. In regard to this question, Petitioners ignore the fact that by their stipulation in the District Court they consented that their liability be tried separately after the trial against all the other defendants and after the foreclosure was completed. By so doing, it is recognized that the foreclosure could conceivably

have produced a sales price sufficient to cover the entire indebtedness. The court found as a conclusion of law (CL 14):

> "Accordingly, plaintiff is entitled to credit and to apply the proceeds of the marshal's foreclosure sale in the manner outlined in Finding of Fact 27."

Finding of Fact 27, among other things, found that Respondent insisted that it may properly utilize the following priorities in crediting the proceeds of the marshal's execution sale: (a), court costs; (b), expenses of preserving its security; (c), attorneys' fees; and (d), interest and principal on the note; and that when so credited and applied there remained a balance due on the note as of November 8, 1967, of $94,577.83, and further found as a conclusion of law (CL 10) that the Judgment and Decree of Foreclosure in no manner or to any extent released or discharged Petitioners Perillo. See *Arizona Title Ins. & Trust Co. v. Kelly,* 11 Ariz. App. 254, 463 P.2d 838.

As to *Czaper v. Ginter,* 76 Ariz. 84, 259 P.2d 253, relied upon by Petitioners, that case simply held that the real estate mortgage must be exhausted before a deficiency judgment could be had, and therefore is not in point and is not applicable to the facts in the instant case.

Examination of each of Petitioners' citations and authorities fails to disclose any sound basis for their contentions herein.

Throughout their Petition and argument in support thereof, we submit that Petitioners merely attempt to show that the District Court and the Court of Appeals erroneously applied the law. Nowhere do they show any special or important reason required under Rule 19 of this Court for the granting of a review on certiorari.

Certiorari is not a matter of right but of grace, and involves sound judicial discretion. The necessity of important reasons for granting the writ are emphasized by *Fay v. Noia,* 83 Sup.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837, wherein this Court stated that certiorari will be granted only when there are special and important reasons therefor. While *Fay* involved a criminal action, we believe that the principle stated is equally applicable to a civil action.

In *Rice v. Sioux City Memorial Park Cemetery,* 75 Sup.Ct. 614, 349 U.S. 70, 99 L.Ed. 897, this Court held that special and important reasons under Rule 19 relate to problems beyond the academic or episodic and also that certiorari should not be granted except in cases involving principles the settlement of which is important to the public as distinguished from the parties.

It is respectfully submitted that Petitioners do not make or attempt to make any showing (a) that the issues involved in this case are of any particular importance to the public; (b) that they involve any novel question of federal law; or (c) that they in any way justify the granting of the relief sought in this Court.

A fair reading of the trial court's Findings of Fact, Conclusions of Law and Judgment and of the affirming opinion of the Court of Appeals fails to disclose any respect in which the judgment against the Petitioners was affirmed by the Court of Appeals upon points not raised or argued.

This matter is one of ordinary litigation only between the parties. A fair trial was held before a capable United States District Judge in which all issues were thoroughly briefed and explored. An appeal was then perfected to the Court of Appeals for the Ninth Circuit where again Petitioners had their "day in court" before a competent tribunal. Therein the matter was thoroughly briefed and thoroughly argued and determined adversely to the contentions of Petitioners, whereupon Petitioners, on a petition for a rehearing, had the further advantage of another review by that court. It is clear that there was no denial of due process in their case.

CONCLUSION

It is respectfully submitted that Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. O. JOHNSON,
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MCFALL & JOHNSON,
STANLEY T. WALLBANK,
Attorneys for Respondent.

September 28, 1972.